

DATE: September 8, 2005

TO: Region Engineers
Region Delivery Engineers
TSC Managers
Resident/Project Engineers
Region Construction Engineers

FROM: Larry E. Tibbits
Chief Operations Officer

John C. Friend
Engineer of Delivery

SUBJECT: Bureau of Highway Instructional Memorandum 2005-14
Federal Participation in Contractor Claims and Court Awards

Federal regulations 23 CFR Section 635.124 require in part that "FHWA shall be made aware by the SHA (State Highway Agency) of the details of the claim at an early stage so that coordination of efforts can be satisfactorily accomplished." The Code of Federal Regulations further states "Federal participation can be approved provided that:

- (1) The FHWA was consulted and concurred in the proposed course of action
- (2) All appropriate courses of action had been considered; and
- (3) The SHA pursues the case diligently and in a professional manner."

The following procedure must be adhered to when MDOT plans to request federal participation in any settlement to a contractor as a result of a claim on a construction contract:

1. The delivery engineer shall notify the FHWA area engineer in writing of individual claims on any FHWA oversight project (non-exempt) that results in an extra or an adjustment of more than \$50,000. The delivery engineer may seek the advice of the FHWA area engineer on any claim issue.
2. The region shall send a copy of the region claim decision to the appropriate FHWA area engineer on all federal aid projects. FHWA does not need to be notified in advance of a region claim meeting.
3. When MDOT's Construction and Technology (C&T) Support Area sends a notification of a Central Office Review (COR) meeting, the FHWA's Engineering and Operations Manager shall be included in this notification on all federal aid projects. FHWA may attend the COR meeting as an observer.
4. When MDOT's C&T Support Area distributes the decision of the COR meeting, FHWA's Engineering and Operations Manager shall be included in this distribution on all federal aid projects.

If litigation is involved, the following additional procedure must be followed:

1. The Attorney General (AG) notifies the C&T Support Area when a contractor files a lawsuit as a result of a claim on any federal aid project.

2. MDOT's C&T Support Area provides a copy of the lawsuit on all federal aid projects to FHWA's Engineering and Operations Manager. The cover letter shall request FHWA review and determination of the extent of involvement in the litigation and participation in any settlement that may result.
3. FHWA sends a letter regarding the litigation to MDOT's C&T Support Area to either:
 - A. Request a meeting with C&T Support Area and the AG assigned to the case to discuss and reach agreement on the proposed course of action, and level of FHWA involvement, or
 - B. Request that MDOT continue to keep FHWA's Engineering and Operations Manager informed during the course of the litigation.

The letter will also address FHWA participation in the claim.

4. MDOT's C&T Support Area shall notify FHWA's Engineering and Operations Manager when the AG is involved in serious settlement discussions. If requested by FHWA, a meeting with MDOT's C&T Support Area and the AG will be scheduled to go over acceptance or rejection of the proposed settlement. At this meeting, the three participants will discuss the legal and factual aspects in conjunction with a course of action.
5. After the lawsuit is settled, MDOT's C&T Support Area will send FHWA's Engineering and Operations Manager a letter with the court order. If an award is made, a request for FHWA participation shall be included.
6. If participation is requested, FHWA will respond in writing to MDOT's C&T Support Area, with a copy to MDOT's Financial Operations Division.
7. If approved for federal participation, additional federal funds will be reimbursed using the normal financial reimbursement procedures.

FHWA's regional counsel is available for consultation and will furnish advice if there are any questions during the litigation process.

Chief Operations Officer

Engineer of Delivery

BOHD:C/T:JJG:kab

Index: FHWA

cc:	C & T Support Area Staff	S. El-Ahmad	MCPA
	M. DeLong	C. Rademacher	MCA
	M. VanPortfleet	P. Sebenick	MAA
	J. Reincke	G. Moore	MITA
	J. Culp	K. Reincke	CRAM
	B. O'Brien	T. Fudaly, FHWA	ACEC
		APAM	